PART B (77 Non-Interveners).

(6) In respect of the following sixty-five (65) companies *viz.*, Ahmad bin Jusoh Sdn. Bhd., Lending & Hiring Sdn. Bhd, Aspatra Holdings Sdn. Bhd., Aspatra Development Sdn. Bhd., Aspatra Gray Mackenzie Sdn. Bhd., Aspatra Trading Sdn. Bhd., Al-Kesil Sdn. Bhd., Aspatra Leasing Sdn. Bhd., Aspatra Nominees Sdn. Bhd., AOE Sdn. Bhd., Anchor Wate Malaysia Sdn. Bhd., Aramor Property Sdn. Bhd., Asiawide Industries Sdn. Bhd., Development Consultants Sdn. Bhd., Eastern Bureau of Communications Sdn. Bhd., Empire Industries Sdn. Bhd., Exploration Consultants Sdn. Bhd., FRD Sdn. Bhd., Georgetown Pharmacy Sdn. Bhd., Development Transport Sdn. Bhd., Harboard Holdings Sdn. Bhd., Hotel Row Sdn. Bhd., Indra Bersekutu Sdn. Bhd., In-Life Trading Sdn. Bhd., Inquip (M) Sdn. Bhd., Jack & Jill Sdn. Bhd., Kemajuan Perkasa Sdn. Bhd., Kentredder (M) Sdn. Bhd., Kenprest (M) Sdn. Bhd., Lorak Holdings Sdn. Bhd., Lorak Development Sdn. Bhd., Lorak Enterprise Sdn. Bhd., Lorak Property Sdn. Bhd., LM Lands Sdn. Bhd., Mutiara Hotel Corp. Sdn. Bhd., Maju Kulim (M) Holdings Sdn. Bhd., Maju Kulim (M) Enterprises Sdn. Bhd., Maju Kulim Development Sdn. Bhd., Maju Kulim Malaysia Sdn. Bhd., Mountbatten Investment Sdn. Bhd., NHS Nominees Sdn. Bhd., New Hibernia Securities Sdn. Bhd., Noble Denton & Associate Sdn. Bhd., Oriescan Sdn. Bhd., Orchid Lands Sdn. Bhd., Orient Air Travel, Sdn. Bhd., Offshore Operators (M) Sdn. Bhd., Pangkor Hotel Corp. Sdn. Bhd., Reptiles Malaysia Sdn. Bhd., Rahid Malaysia Sdn. Bhd., Seltra Warehousing Sdn. Bhd., Sercon Sdn. Bhd., Syarikat Pembangunan Melayu Jaya Sdn. Bhd., Sg. Ayer Hitam Sdn. Bhd., Travel Services Malaysia Sdn. Bhd., Tourists Centre Sdn. Bhd., Tanjong Securities Sdn. Bhd., Telok Batak Granite Quarry Sdn. Bhd., Variel Systems (M) Sdn. Bhd., Cenderai Holdings Sdn. Bhd., Wei Fong Realty Sdn. Bhd., Designs Misin Sdn. Bhd., Engineering & Marine Services (M) Sdn. Bhd., Muda Development Corp. Sdn. Bhd. and Otomotif Malaysia Sdn. Bhd., I order as follows:—

(a) the injunctions granted on January 15, 1985 and varied on February 18, 1985 continue in force,

(b) Liberty to apply.

(7) In respect of the following eight (8) companies *viz.* Aspatra Industries Sdn. Bhd., Aspatra Warehousing Sdn. Bhd., Landhill Properties Sdn. Bhd., Anggerik Merpati Sdn. Bhd., Aspatra Warehouse Sdn. Bhd., Broadvis Sdn. Bhd., Crossway Properties Sdn. Bhd. and Scorpion Orchid Properties Sdn. Bhd., I order as follows:—

(a) The injunctions dated January 10 & 15, 1985 in so far as they touch, concern and affect them, be and are hereby dissolved with costs,

(b) Liberty to apply.

(8) In respect of the following four (4) companies *viz.* Malaysian Tours and Safari Sdn. Bhd., Syarikat Kewangan Melayu Raya Sdn. Bhd., Darul Aman Holdings Sdn. Bhd. and National Timber Co. Sdn., I order as follows:—

(a) The said four companies are restrained froms transferring, selling, dealing with, pledging or otherwise disposing of Lorrain's shares,

(b) Liberty to apply.

Order accordingly.

Solicitors: *Skrine & Co.; James Foong, Anad & Co.*

MOHAMED DIN v. PUBLIC PROSECUTOR

[A.Cr.J. (Gunn Chit Tuan J.) November 30, 1984; December 3, 4, 6, 7 & 21, 1984]
[Kuala Lumpur — Criminal Appeal No. 103 of 1983]

Criminal Law and Procedure — Bribery and corruption — Evidence — Whether witness an accomplice or credible witness.

Evidence — Corroborative evidence — Probative value — Public body — Prima facie case not made out — Failure to consider defence adequately — Failure of justice.

The appellant was charged in the Sessions Court with two offences under the Prevention of Corruption Act 1961 (Revised 1971). He was acquitted on the 1st amended charge under section 3(a) (i), but was convicted on the 2nd amended charge under section 4(a) of the Act for corruptly accepting a gratification of $23,773.50, and was sentenced to one day's imprisonment and a fine of $5,000.00 in default one year's imprisonment. He was also ordered to pay a penalty of $23,773.50. Hence this appeal by the appellant. It was alleged for the prosecution that before purchasing a weed killer called Desatox for Syarikat Pem-

bangunan Pekebun Kecil Sdn. Bhd. ("the Company"), the appellant, who was Special Assistant to its Chairman/Chief Executive, asked P.W. 12, Chairman of Hua Sing Chemicals (M) Sdn. Bhd. for a commission and that P.W.12 agreed to pay the commission which worked out to $23,773.50. A receipt dated December 4, 1980 was prepared and it was signed by the appellant, who denied this allegation.

It was contended on behalf of the appellant that the learned trial President had failed to make any finding as to whether or not P.W. 12 was an accomplice or whether or not he was a credible witness, and there was no corroborative evidence; and a *prima facie* case had not been made out.

Held: (1) the name and address of the person who presented the cheque and received the cash at the bank was not recorded. There was a doubt about the signature on the cash voucher (exh. P. 9). The alleged corroborative evidence adduced by the prosecution was of no truly probative value on the most relevant issue in this case. Apart from the evidence that the shares of the Company were allotted to RISDA, there was no other evidence adduced to show how the Company could be regarded as a "public body" within the meaning of section 2 of the Act. Therefore a *prima facie* case had not been made out by the prosecution at the close of its case;

(2) having called for the defence, the President did not consider it adequately. The appellant did not have a trial in which the relevant law has been strictly followed and has therefore lost a chance which was fairly open to him of being acquitted. The cumulative effect of the various errors in the judgment of the lower court was that there has been a failure of justice and in the circumstances the appeal should be allowed and the conviction and sentence on the 2nd amended charge set aside. No re-trial should be ordered;

(3) the Public Prosecutor's cross-appeal against sentence was dismissed;

(4) the fine of $5,000.00 and the penalty of $23,773.50 must be refunded to the appellant.

Cases referred to:

(1) *Yap Ee Kong & Anor.* v. *Public Prosecutor* [1981] 1 M.L.J. 144, 146.
(2) *Rattan Singh* v. *Public Prosecutor* [1971] 1 M.L.J. 162, 164.
(3) *Chao Chong & Ors.* v. *Public Prosecutor* [1960] M.L.J. 238, 239.
(4) *Tan Yook Suan* v. *R.* [1954] M.L.J. 116.
(5) *Davies* v. *Director of Public Prosecutions* [1954] 2 W.L.R. 343; [1954] 1 All E.R. 507.
(6) *Re Lewis* (1938) 26 Cr. App. R. 110.
(7) *Attan b. Abdul Gani* v. *Public Prosecutor* [1970] 2 M.L.J. 143, 146.
(8) *Dowse* v. *Attorney-General, Federation of Malaya* [1961] M.L.J. 249, 252.
(9) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89, 90, 91.
(10) *Mahesan* v. *Public Prosecutor* [1970] 1 M.L.J. 255, 259.
(11) *Mraz* v. *R.* (1955) 93 C.L.R. 493, 514.
(12) *Krishna Murthy* v. *Abdul Subban* [1965] 1 Cr. L.J. 565, 576.
(13) *R.* v. *Saunders* (1974) 58 Cr. App. R. 248.

CRIMINAL APPEAL.

Sri Ram (*Dennis Appaduray* with him) for the appellant.

Sazali b. Abdul Ghani (Deputy Public Prosecutor) for Public Prosecutor.

Cur. Adv. Vult.

Gunn Chit Tuan J.: The appellant Mohd. Din @ Mohd. Nor bin Awang was on March 2, 1983, charged for two offences under sections 3(a) (i) and 4(a) of the Prevention of Corruption Act, 1961 (Revised – 1971). The charges were before commencement of trial amended to read as follows:–

"First Charge:
That you sometime in early 1980, at No. 39A, Lorong Haji Taib Dua, Jalan Raja Laut, Kuala Lumpur, in the Federal Territory, Kuala Lumpur, did corruptly solicit for yourself a gratification, to wit, a commission of $23,773.50 from one CHAU TAI HONG, the Managing Director of Hua Sing Chemicals (M) Sdn. Bhd. as an inducement to you to do something in a matter likely to take place, to wit, to procure for Hua Sing Chemicals (M) Sdn. Bhd. the sale of 7,500 units of 25 kgs. pack of Desatox 325 to Smallholders Development Corporation Sdn. Bhd. and that you thereby committed an offence punishable under section 3(a) (i) of the Prevention of Corruption Act, 1961 (Laws of Malaysia Act No: 57)."

Second Charge:
"That you on December 4, 1980 at No. 39A Lorong Haji Taib Dua, Jalan Raja Laut, in the Federal Territory, Kuala Lumpur, being an agent of Smallholders Development Corporation Sdn. Bhd. namely the Special Assistant to the Chairman cum Chief Executive and also being the General Manager of the said Smallholders Development Corporation Sdn. Bhd., did corruptly accept for yourself a gratification, to wit, a sum of $23,773.50 from one CHAU TAI HONG, the Managing Director of Hua Sing Chemicals (M) Sdn. Bhd. as a reward for doing an act in relation to your principal's affairs, to wit, for having had procured the sale of 7,500 units of 25 kgs. pack of Desatox 325 for Hua Sing Chemicals (M) Sdn. Bhd. to Smallholders Development Corporation Sdn. Bhd. and that you thereby committed an offence punishable under section 4(a) of the Prevention of Corruption Act, 1961 (Laws of Malaysia Act, 57)."

He was acquitted and discharged on the first amended charge but was convicted on the second amended charge and sentenced on September 5, 1983, to one day's imprisonment and a fine of $5,000/– in default one year's imprisonment. He was also ordered to pay a penalty of $23,773.50.

The following primary facts of the case as found by the learned President were not disputed by the defence. In the month of December 1978 the appellant was appointed by Syarikat Pembangunan Pekebun Kecil Sdn. Bhd. (the company) to

be Special Assistant to its Chairman/Chief Executive. In the course of his duties the appellant held himself out to be the General Manager when he wrote to the staff of the office as well as to members of the public. In 1979 one Chau Tai Hong (P.W.12) who was the Chairman of Hua Sing Chemicals (M) Sdn. Bhd. was introduced to the appellant. After the introduction the appellant told P.W.12 that he wanted to purchase a weed killer called Desatox for the company. After some negotiations the appellant agreed to purchase 7500 units of 25 kgs. pack of Desatox 325 from P.W.12 who had brought the appellant to see one Wong See Ping (P.W.13) the manager of Special Project for Ancom Sdn. Bhd. the local manufacturers of Desatox.

On behalf of the prosecution it was alleged that before purchasing the Desatox the appellant asked P.W.12 for some commission and that after discussion P.W.12 agreed to give the appellant some commission and their agreement was embodied in a letter dated October 14, 1980, (exhibit P. 8) written by P.W.12 to the appellant. In exhibit P.8 P.W.12 agreed to pay the appellant a commission of 60% of the excess of the sale price over his cost price which worked out to $23,773.50. According to P.W.12 he instructed a clerk in his Singapore company called Hua Sing Chemicals Pte. Ltd. to prepare a receipt dated December 4, 1980 (exhibit P.9). He took a plane from Singapore to Kuala Lumpur on that day and the appellant signed that receipt in his presence in Kuala Lumpur. The appellant was supposed to have gone to Singapore to collect the money personally but he subsequently sent someone with a letter to collect the money on his behalf. P.W.12 said that he paid the money to the bearer of that letter which had the appellant's signature on it. That part of P.W.12's evidence was of course denied by the appellant in his defence. However, at the close of the case for the prosecution the learned President in his grounds of judgment stated that he had considered carefully the evidence of the prosecution witnesses and found that the prosecution had failed to prove a *prima facie* case on the first amended charge although I would have thought, having considered the evidence recorded by him, that there was a *prima facie* case on that amended charge, but as the prosecution had not appealed against the acquittal and discharge of the appellant on the first amended charge nor has the learned President given his reasons therefor in his judgment, it was not necessary for me to consider it further.

As regards the conviction of the appellant on the second amended charge, although there were several grounds of appeal in his petition of appeal, Mr. Sri Ram, leading counsel for the appellant, informed the Court that he would only rely on those grounds on which he proposed to address the Court for its consideration. Counsel then referred to the learned President's judgment which was written in Bahasa Malaysia and pointed out that he had failed to make any finding therein as to whether or not P.W.12, who was the main prosecution witness, was an accomplice. He contended that the learned President was of the view that it did not matter whether P.W.12 was an accomplice when he said as follows:—

"Dengan keterangan-keterangan di atas jelaslah ianya-memyokong (corroborate) keterangan S.P.12 itu. Oleh itu samada S.P.12 seorang pensubahat atau tidak tidak begitu penting."

Counsel also pointed out that the learned President did not say whether P.W.12 was a credible witness and merely stated that P.W.12 could be believed just because his evidence was corroborated and not because he was a truthful witness. It was the contention of counsel, after referring to *Yap Ee Kong & Another* v. *Public Prosecutor*[1] that it was a serious misdirection on the part of the learned President not to have evaluated the evidence of P.W.12, who was an accomplice, first to find if his evidence was credible and acceptable before proceeding to find out whether there was any corroboration of his evidence. It was also his contention after referring to *Rattan Singh* v. *Public Prosecutor*[2] and *Chao Chong & Others* v. *Public Prosecutor* [3] that P.W.12 was an accomplice as he did not lodge any police report at all and had played an active part in the transaction and was quite prepared to bribe the appellant with whom he had negotiated for that purpose and as such a witness he was not covered by section 18 of the Prevention of Corruption Act, 1961. Finally on the subject of an accomplice and the necessity for warning before accepting his evidence, counsel referred to the judgment of Murray-Aynsley, C.J. (as he then was) in *Tan Yook Suan* v. *Regina* [4] in which His Lordship, following *Davies* v. *Director of Public Prosecution*[5] held that in a criminal trial when a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the Judge to warn the jury that, although they may convict on his evidence, it is dangerous to do so unless it is corroborated. His Lordship also held that that rule, although a rule of practice, now had the force of law and that when a Judge failed to warn the jury in accordance with this rule, the conviction would be quashed, even if in fact there was ample corro-

boration of the evidence of the accomplice. In the course of his judgment, His Lordship also referred to the case of *Lewis* [6] in which the English Court of Criminal Appeal had held that where the presiding Judge at the trial has omitted to give any direction to the jury as to the danger of convicting the accused person on the uncorroborated evidence of accomplices, the conviction may be allowed to stand if, but only if, there exists corroborative evidence of such a convincing, cogent or irresistible character that the jury, if they had received the proper direction, must have come to the same conclusion. Counsel then submitted that the misdirection of the learned President of himself must be treated in the same way as an erroneous direction to a jury and after referring to the following passage in the judgment of the learned President:—

"Sungguhpun saya tidak rekodkan tetapi saya telah memberi amaran yang secukupnya kepada diri saya akan bahayanya menerima keterangan S.P.12.",

queried whether the learned President did in fact warn himself when he convicted the appellant on September 5, 1983, or whether he had merely stated so when he wrote his grounds of judgment 5½ months after the date of his decision.

Although the learned President did not make any finding on the credibility of P.W.12 or whether or not he was an accomplice and apparently forgot about the warning he had administered to himself at the close of the case for the prosecution when he convicted the appellant and when he wrote his judgment about 5½ months later, yet he did state as follows in his grounds of decision:—

"Sekiranya beliau seorang pensubahat keterangannya boleh diterima sebab ianya disokong oleh keterangan-keterangan lain yang bebas dalam butir-butir yang mustahak. Juga, keterangan pensubahat boleh diterima sekiranya ia menunjukkan keputusan pada suatu perkara sahaja, iaitu, akan kesalahan tertuduh."

The learned deputy also contended that assuming that P.W.12 was an accomplice, it was his submission, after reference to *Attan b. Abdul Gani* v. *Public Prosecutor* [7] in which case Sharma J. (as he then was) had summarised the law as to corroboration as enunciated by the various authorities, that there was sufficient corroborative evidence in this case. He also pointed out the following passage in the judgment of the learned President'—

"Mengikut keterangan Chau Tai Hong (S.P.12) dengan disokong oleh saksi-saksi pendakwa dan keterangan dokumen yang dikemukakan saya berpuashati bahawa tertuduh telah terima wang tersebut.

Rozita bt. Mohd. Zain (S.P.10) dalam keterangannya menyatakan beliau cam tandatangan di dokumen P.8 & P.9 itu. Apabila ditunjuk P.9 kepadanya beliau kata "Saya cam tandatangan di tempat "received by" Ini tandatangan Encik Mohd. Nor" dan beliau tunjukkan kepada tertuduh. Apabila ditunjuk tandatangan di sebelah kanan bawah di P.8 kepadanya beliau (S.P.10) kata "Ini tandatangan tertuduh." S.P.10 cam tandatangan tertuduh sebab beliau pernah berkerja dengan tertuduh selama lebih-kurang tiga tahun."

On this point it was the submission of counsel for the appellant that evidence to be of any corroborative value must be material. He referred to the Privy Council case of *Dowse* v. *Attorney-General, Federation of Malaya* [8] in which Their Lordships held *'inter alia'* that evidence, to be corroborative, must be truly probative of the relevant issue; that is, it must positively implicate the accused person and positively show or tend to show the truth of the accomplice's story that the accused committed the offence. A fact which is indifferently consistent with the accomplice's story and the accused's denial of it is neutral and supplies no corroboration. Counsel for the appellant then referred to the following passage in the learned President's judgment:—

"Setelah saya meneliti keterangan saksi-saksi pihak pendakwa saya dapati mereka menyokong (corroborate) keterangan S.P.12. Mithalnya, pegawai bank (S.P.5), menyatakan bahawa cek (P.22) itu telah dikeluarkan oleh Hua Sing Chemicals pada December 4, 1980. S.P.6 akui yang beliau menandatangani cek (P.22) itu. S.P.7 menyatakan beliau menyediakan baucer (P.9) itu atas arahan S.P.12.

S.P.8 juga menyatakan yang beliau ada lihat rekod menunjukkan komisyen dibayar kepada tertuduh. S.P.8 juga beritahu bahawa Hua Sing Chemicals ada bayar $5,000/— kepada tertuduh tetapi bayaran itu tidak ada kena-mengena dengan penjualan Desatox ini.

S.P.13 pula menyokong keterangan S.P.12 dengan menyatakan tertuduh dan S.P.12 ada berjumpanya berkira untuk membeli Desatox.

S.P.16, kerani kanan akaun dengan Hua Sing Chemicals (M) Sdn. Bhd., memberitahu yang beliau menyediakan baucer P.36. Beliau sediakan P.36 berdasarkan kepada P.8, P.9, P.24 dan P.26 yang diberikan kepadanya oleh S.P.12. Baucer P.36 menunjukkan bahawa jumlah S$22,575.46 dibayar kepada Mohd. Nor bin Awang, tertuduh.",

and contended that the evidence which was considered by the president to be corroborative of P.W.12's evidence was not capable of constituting corroborative evidence.

On examining the recorded evidence of those witnesses referred to by the learned President I found that the evidence of Lee Peng Leong (P.W.5), a bank officer attached to the United Overseas

Bank, Singapore, only showed that a cash cheque (exhibit P.22) was issued by Hua Sing Chemicals (Pte.) Ltd. on December 4, 1980. The name and address of the person who presented the cheque and received the cash at the bank was not recorded. Chow Chee Wan (P.W.6), who is a company director of Hua Sing Chemicals (Pte.) Ltd. and a son of P.W.12, said that when he signed that cheque (exhibit P.22) it was a blank cheque. Soh Kim Joon (P.W.7) an accounts clerk attached to Hua Sing Chemicals (Pte.) Ltd., Singapore, said that he prepared the receipt or what he called a cash voucher (exhibit P.9) on the instructions of P.W.12 who did not tell him what the money was for. Chow Chee Beng (P.W.8) said that it was his father P.W.12 who had told him about a commission involved in that sale and that he could have seen their company's correspondence about the commission paid to the accused and the learned president very correctly noted that a sum of $5,000/- which that witness remembered was paid to the appellant in 1982 in respect of consultancy had nothing to do with the sale of Desatox in question. The said Wong See Ping (P.W.13) who was the manager of the local manufacturers of Desatox confirmed P.W.12's evidence about a meeting between them and the appellant on August 28, 1980 in the appellant's office in Hotel Merlin, and finally Chok Saw Lan (P.W.16) who was the senior clerk attached to Hua Sing Chemicals (M) Sdn. Bhd. said that he prepared the document which he called a voucher (exhibit P.36) based on the exhibits marked P.8, P.9, P.24, which was a calculation slip, and P.26 which was a receipt from Hua Sing Chemicals (M) Sdn. Bhd. acknowledging receipt from Hua Sing Chemicals (Pte.) Ltd. of a sum of $22,575.46. After examining the evidence of those prosecution witness and the documents referred to by the learned President I agreed with counsel for the appellant that all the alleged corroborative evidence was of no truly probative value on the most relevant issue in this case and that is whether the prosecution had proved beyond reasonable doubt that the appellant did in fact receive the said sum of $23,773.50. Although there was some confirmation of the evidence of P.W.12 yet it must be borne in mind that P.W.12 was an accomplice whose evidence should be treated with great suspicion and whose evidence should be independently confirmed on every material circumstance. In this case these was no independant evidence to corroborate the evidence of P.W.12 that a man came to see him in Singapore bearing a letter from the appellant with the latter's signature on it. P.W.12 said that he took possession of that letter which he claimed to have returned to the appellant after the latter had signed the said voucher (exhibit P.9) before him in Kuala Lumpur. The signature on P.9 was however denied by the appellant and challenged by the defence which contended that the learned President only relied upon the evidence and demeanour of P.W.10 in coming to the conclusion that the signature on exhibit P.9 was that of the appellant without considering the evidence of another prosecution witness called Marsita Adlina bt. Abdul Rahman (P.W.9) who was the Personal Assistant to the Chairman/ General Manager of the company. That witness had worked with the appellant in 1980 when the appellant was holding himself out to be the General Manager of the company. There was therefore a doubt about the signature on exhibit P.9 after P.W.9, who had worked together with the appellant, could not recognise the signature whereas P.W.10, who was only a receptionist/clerk with the company in 1980 and did not work together with the appellant, claimed that she could recognise the signature. The learned President therefore only relied on evidence favourable to the prosecution when he said "Rozita (S.P.10) ini adalah seorang saksi yang boleh dipercayai sebab tiada satu keterangan pun menunjukkan sebaliknya" and did not consider at all the evidence which was favourable to the defence and which had raised a reasonable doubt in the prosecution's case.

As regards the ingredients for an offence under section 4(a) of the Prevention of Corruption Act, 1961, counsel for the appellant referred to the following passage of Lord Diplock in the Privy Council's case of *Public Prosecutor* v. *Yuvaraj* [9]:-

> "Where a defendant is charged with an offence under section 4(a) of the Prevention of Corruption Act, 1961, to which section 14 also applied, the onus lies upon the prosecution to prove the first two factual ingredients of the offence viz (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift or receipt he was in the employment of a public body. Upon proof of these two ingredients the existence of the third ingredient, viz. (3) that the gratification was paid or given or received corruptly as an inducement or reward for doing or forbearing to do an act in relation to the affairs of that public body, is to be presumed "unless the contrary is proved.",

and submitted that the learned president did not make any finding as to whether the appellant was in the employment of a public body and that without such a finding the prosecution could not rely on the presumption in section 14 of the said Act to prove that a gratification had been paid or given and received corruptly as an inducement or reward. Counsel then referred to the evidence of one Zaileni bt. Kasim (P.W.1), a junior trade registration officer in the Registry of Companies, who stated in

evidence that 1,999,998 shares of $1/- each were allotted to RISDA. There was no doubt and it was conceded by the defence, that the appellant was an agent of the company as defined in the said Act and the learned president in his judgment stated as follows:-

"Mengikut keterangan, saya tidak raguragu lagi bahawa tertuduh adalah seorang ejen kepada Syarikat Pembangunan Pekebun Kecil Sdn. Bhd. Ini adalah berdasarkan kepada erti ejen yang ditafsirkan di dalam seksyen 2 Akta Pencegah Rasuah, 1961, (Semakan 1971). Ejen ialah seorang, antara lain, "employee" badan awam. Dalam kes ini ada menunjukkan bahawa tertuduh diguna khidmat (employed) oleh Syarikat Pembangunan Pekebun Kecil sepertimana surat perlantikan (P.5) itu."

But the learned president did not show in his judgment and give any reasons as to why the company was a "public body" as defined in section 2 of the said Act. Counsel for the appellant referred to *Mahesan* v. *Public Prosecutor* [10] in which case it was held by the Federal Court that the Malaysian Government Officers' Co-operative Housing Society Limited was not a "public body" as defined in section 2 of the said Act as the service offered by it was not a service of the Government of Malaysia or of any State Government. Apart from the evidence of the said Zaileni bt. Kasim (P.W.1) that the shares of the company were allotted to RISDA, there was no other evidence adduced nor arguments advanced by the prosecution to show how the company could be regarded as a "public body" within the meaning of section 2 of the said Act. I therefore agreed with counsel for the appellant that a *'prima facie'* case under section 4(a) of the said Act had not been made out and that at the close of the case for the prosecution the learned president should not have called for the defence on the second amended charge.

Be that as it may, after calling on the appellant to enter on his defence and having heard his case, the learned president did not consider it adequately. Although the appellant, who elected to give evidence on oath, was in the witness box for nearly three whole days and his evidence as recorded by the learned president filled nearly fourteen pages of type-written notes, yet the president merely dealt with the defence in four short paragraphs and did not give any reasons why he did not believe the appellant nor give adequate reasons why he rejected his defence.

No finding, sentence or order passed by a subordinate court should be reversed or altered on account of any error in the judgment of that Court unless such error has occasioned a failure of justice (section 422 of the Criminal Procedure Code (F.M.S. Cap. 6). It was the submission of counsel for the appellant that there were errors in the judgment of the lower court which have resulted in a failure of justice in this case. Counsel on both sides informed the court that they have not been able to find any Malaysian authority on what is meant by "failure of justice". Counsel for the appellant, however, did refer me to the following passage of Fullagar J. in the High Court of Australia case of *Mraz* v. *the Queen* [11] concerning the meaning of the expression "miscarriage of justice" in section 6(1) of the New South Wales Criminal Appeal Act of 1912:-

"It is very well established that the proviso to section 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried."

Mr. Sri Ram also referred to the following passage in the judgment of Hegde J. in the Indian case of *Krishna Murthy* v. *Abdul Subban* [12]:-

"The expression "a failure of justice has in fact occasioned thereby" found in Section 535(1), Cr. P.C. does not connote that the Court should be of the opinion that an innocent person has been convicted or the case against the accused person is not made out beyond reasonable doubt. An accused person is entitled to be acquitted whether there was a fair trial or not if no case is made out against him. For that purpose the Legislature need not have introduced the conception of "failure of justice" in sections 535 and 537, Cr. P.C. The "failure of justice" mentioned therein is that occasioned by the contravention of the provisions in Chapter XIX, Cr. P.C. In law the expression "justice" comprehends not merely a just decision but also a fair trial. Sections 535 and 537, Cr. P.C. have primarily in view a fair trial. For the purpose of those sections a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked."

I would respectfully agree with the above dicta of their Lordships in the High Courts of Australia and India and in so far as our present case is concerned I agreed that the appellant did not have a

trial in which the relevant law has been strictly followed and has therefore lost a chance which was fairly open to him of being acquitted. The cumulative effect of the various errors in the judgment of the lower court was that there has been a failure of justice and in the circumstances of the case the appeal should be allowed and the conviction and sentence on the second amended charge set aside. As nearly four years have lapsed since the commission of the offence, I also did not consider it fair to order a retrial. (*R.* v. *Saunders*[13]). The Public Prosecutor's cross-appeal against sentence was also dismissed and I ordered that the fine of $5,000/- and the penalty of $23,773.50 be repaid to the appellant.

Appeal allowed; Conviction and sentence set aside.

Solicitors: *Sidek Zubir Wan Sulaiman & Partners.*

CHEONG AH CHEOW v. PUBLIC PROSECUTOR

[A. Cr.J. (Chan J.) March 6, 1985]

[Kuala Lumpur – Federal Territory Criminal Appeal No. 31 of 1984]

Criminal Law and Procedure – Betting as bookmaker – Sentence – Principles of sentencing – Jurisdiction of Subordinate Court – Betting Ordinance, 1953, ss. 6(3)(a) & 18(3) – Subordinate Courts Act, 1948, s.87 – Criminal Procedure Code (F.M.S. Cap. 6), s.283(1)(c).

Betting – Bookmaker – Sentence – Betting Ordinance 1953, ss. 6(3)(a) & 18(3).

The appellant had admitted to acting as a bookmaker in relation to the Merdeka Football Tournament and pleaded guilty to the offence under section 6(3)(a) of the Betting Ordinance, 1953. He was sentenced to 18 months imprisonment plus a fine of $20,000 in default 12 months imprisonment. The learned magistrate also ordered the forfeiture of the sum of $3,310 found on the appellant when he was arrested. The appeal was against sentence.

Held: (1) the magistrate in this case has jurisdiction to award the full punishment authorised by section 6(3) of the Betting Ordinance because section 18(3) of the Betting Ordinance has given jurisdiction in excess of the power laid down by section 87(1) of the Subordinate Courts Act, 1948;

(2) the seriousness of the situation caused by bookmakers in relation to sports in this country needs no emphasis and is well known to everyone. Having regard to the prevalence of such offences in this country, the sentence which the learned magistrate has passed on the appellant is well justified both as a punishment for the appellant and as a warning to others who might be tempted to embark on similar enterprises;

(3) the period of imprisonment in default of paying the fine of $20,000 imposed should be reduced to six months, in accordance with section 283(1)(c) of the Criminal Procedure Code;

(4) the money found on the accused was related to the bets placed and was rightly forfeited.

CRIMINAL APPEAL.

Manjeet Singh Dhillon for the appellant.

Tan Hock Chuan (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Chan J.: On March 7, 1984 the appellant, Cheong Ah Cheow, appeared at the Magistrates' Court at Kuala Lumpur where he pleaded guilty to the offence of acting as a bookmaker under section 6(3)(a) of the Betting Ordinance 1953. He was sentenced to 18 months' imprisonment plus a fine of $20,000 in default 12 months' imprisonment. The magistrate also ordered the forfeiture of the money that was found on him when he was arrested.

At about 4.40 p.m. on September 30, 1983 a police party, acting on information received, raided a stall at No. 13 Petaling Street. The raiding party was led by Inspector Jalil Darus. Cheong Ah Cheow was at the stall. He was on the telephone at the time and he was seen writing something on a writing pad. Inspector Jalil identified himself as a police officer. He ordered the seizure of all the writing materials that were found in front of Cheong Ah Cheow. A sum of $3,310 which was found in his pocket was also seized by the police. He was arrested and taken to the Jalan Bandar police station.

The seized articles were handed to Inspector Gan Teck Lim who is an expert on gambling. The expert was of the view that entries made on the exhibits that had been seized at the raid were records of bets relating to the 27th Merdeka Football Tournament which was to have been held between September 14 to October 2, 1983. All the entries were found to refer to the match between Korea and Malaysia which had been scheduled to be played on September 14. The total amount of the bets which had been placed on the match amount-